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No. 09-122

In the Supreme Court of the United States

DEMARICK HUNTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether petitioner has made a "substantial showing of the denial of a constitutional right," thus justifying the issuance of a certificate of appealability under 28 U.S.C. 2253(c), when, under decisions of this Court construing the Armed Career Criminal Act, petitioner's term of imprisonment exceeds the maximum term authorized for his offense as a matter of law.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 559 F.3d 1188.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 2009. On May 6, 2009, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including June 24, 2009. On June 12, 2009, Justice Thomas further extended the time to July 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). He was sentenced under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), to 188 months of imprisonment, five years of supervised release, a $3000 fine, and a special assessment of $100. Gov't C.A. Br. at 1, *United States* v. *Demarick*, 140 Fed. Appx. 163 (11th Cir. 2005) (No. 04-15136). On direct appeal, the court of appeals affirmed. Petitioner then filed a motion to vacate his sentence under 28 U.S.C. 2255.[1] The district court denied that motion as well as petitioner's motion for a certificate of appealability (COA). The court of appeals also denied petitioner's motion for a COA and for reconsideration of that decision. Petitioner then petitioned for a writ of certiorari. The government agreed that further consideration was warranted in light of *Begay* v. *United States*, 128 S. Ct. 1581 (2008), and this Court granted the petition, vacated the judgment, and remanded the case to the court of appeals for further consideration in light of *Begay*. On remand, the court of appeals again declined to issue a COA. Pet. App. 1a-4a.

1. On August 15, 2003, a Florida police officer stopped a car in which petitioner, a convicted felon, was a passenger. During the stop, the officer found a pistol and a holster inside the car. The driver later testified

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[1] The Court Security Improvement Act of 2008, Pub. L. No. 110-177, § 511, 121 Stat. 2545, made a technical amendment to 28 U.S.C. 2255, designating the eight undesignated paragraphs as Subsections (a) through (h), respectively. Except where noted, all citations in this brief to 28 U.S.C. 2255 refer to the current version as it will be codified in the 2008 Supplement to the United States Code.

that the gun and the holster belonged to petitioner. Gov't C.A. Br. at 1-4, *Demarick*, *supra* (No. 04-15136). Petitioner was charged in the Southern District of Florida with possessing a firearm as a convicted felon, in violation of 18 U.S.C. 922(g)(1), and convicted after a jury trial. *Ibid.*

2. The ACCA provides for a mandatory minimum sentence of 15 years of imprisonment if the defendant has violated 18 U.S.C. 922(g)(1) and has at least three prior convictions for a "violent felony" or a "serious drug offense." 18 U.S.C. 924(e)(1). "[V]iolent felony" is defined as, *inter alia*, an offense that "presents a serious potential risk of physical injury to another." 18 U.S.C. 924(e)(2)(b)(ii). If the ACCA does not apply, the maximum penalty for a Section 922(g) offense is ten years of imprisonment, and there is no mandatory minimum sentence. See 18 U.S.C. 924(a)(2).

Before petitioner was sentenced, the probation office prepared a Presentence Investigation Report (PSR) indicating that petitioner was subject to the mandatory 15-year minimum sentence under the ACCA because he had three prior convictions for "violent felon[ies]" or "serious drug offense[s]." In particular, the PSR included as "violent felon[ies]" petitioner's two convictions for carrying a concealed firearm in 1996 and 1999. The district court adopted the PSR's findings and recommendations and sentenced petitioner to 188 months of imprisonment. Gov't C.A. Br. at 1, 4-5, *Demarick*, *supra* (No. 04-15136).

On direct appeal, petitioner argued that the district court erred in imposing a mandatory Guidelines sentence under *United States* v. *Booker*, 543 U.S. 220 (2005). Petitioner did not challenge the district court's conclusion that his prior convictions for carrying a con-

cealed firearm qualified as "violent felon[ies]" under the ACCA, a claim that at that time was squarely foreclosed by circuit precedent. See *United States* v. *Hall*, 77 F.3d 398, 401 (11th Cir.) ("Carrying a concealed weapon is conduct that poses serious potential risk of physical injury and, so, falls under the definition of violent felony."), cert. denied, 519 U.S. 849 (1996). The court of appeals affirmed petitioner's conviction and sentence. *United States* v. *Demarick*, 140 Fed. Appx. 163 (11th Cir. 2005) (per curiam).

3. On October 6, 2006, petitioner filed a pro se motion under 28 U.S.C. 2255 to vacate his sentence. Pet. App. 12a; Pet. 6. He alleged, *inter alia*, that the court violated his Fifth Amendment due process rights when it sentenced him under the ACCA because a conviction for carrying a concealed firearm does not qualify as a "violent felony." Petitioner also asserted that his trial and appellate counsel were ineffective in not challenging the use of his concealed-firearm convictions as predicates for application of the ACCA. The motion was referred to a magistrate judge, who recommended that it be denied on the ground that petitioner's arguments were foreclosed by *Hall*, *supra*. Pet. App. 12a-19a. On April 16, 2007, the district court adopted the magistrate judge's report and denied petitioner's Section 2255 motion. *Id.* at 10a-11a. By separate order dated August 6, 2007, the district court denied petitioner's motion for a COA. *Id.* at 9a.

4. Petitioner moved for a COA in the court of appeals, renewing his contentions that the district court committed constitutional error in sentencing him under the ACCA and that his counsel rendered ineffective assistance in failing to challenge the enhancement. Mot. for COA 4. On December 4, 2007, the court of appeals

denied petitioner's request for a COA. Pet. App. 8a. On reconsideration, the court again denied the motion, citing *Strickland* v. *Washington*, 466 U.S. 668 (1984), and *Hall*, *supra*. Pet. App. 7a.

5. On April 16, 2008, this Court decided *Begay* v. *United States*, 128 S. Ct. 1581 (2008), holding that a conviction for driving while under the influence of alcohol or drugs is not a "violent felony" under the ACCA's "serious potential risk of physical injury to another" prong. *Id.* at 1588. The court interpreted that language to encompass only offenses involving conduct that is "purposeful, violent, and aggressive." *Ibid.* One week later, on April 23, 2008, petitioner filed a petition for a writ of certiorari, contending that his two concealed-firearm convictions are not "violent felonies" under the ACCA.

In response, the government agreed that the petition should be granted, the judgment vacated, and the case remanded to the court of appeals for further consideration in light of *Begay*. The government observed that on April 28, 2008, this Court had vacated and remanded for reconsideration in light of *Begay* the Eleventh Circuit's judgment in *United States* v. *Archer*, 243 Fed. Appx. 564 (2007) (per curiam), vacated, 128 S. Ct. 2051 (2008). U.S. Br. at 5-6, *Hunter* v. *United States*, 129 S. Ct. 594 (2008) (No. 07-11550). That case addressed the related question whether a conviction for carrying a concealed firearm constitutes a "crime of violence" under the career offender guideline, Sentencing Guidelines § 4B1.2, which, like the ACCA, defines a qualifying crime for relevant purposes as an offense that "presents a serious potential risk of physical injury to another." See *ibid.* The government noted that, on remand, the Eleventh Circuit held that carrying a concealed firearm does not satisfy that definition. *United States* v. *Archer*,

531 F.3d 1347, 1352 (2008).[2] The government further observed that even though petitioner's claim arose on collateral attack rather than on direct appeal, the intervening decisions in *Begay* and in *Archer* counseled in favor of allowing the Eleventh Circuit to decide whether to issue a COA in this case. U.S. Br. at 5-6, *Hunter*, *supra* (No. 07-11550).

6. On November 17, 2008, this Court granted the petition, vacated the Eleventh Circuit's judgment, and remanded the case to the court of appeals for further consideration in light of *Begay*. Pet. App. 6a.

7. On remand, without requesting the views of the government, the court of appeals again declined to issue a COA. Pet. App. 1a-4a. The court first observed that under 28 U.S.C. 2253(c)(2), a COA may issue only upon a "substantial showing of the denial of a constitutional right." Pet. App. 1a. The court recognized that, in *Archer*, it had "stated, in dicta, that carrying a concealed weapon is not a violent felony under the [ACCA]," and the court therefore acknowledged that there was "good reason to conclude that [petitioner] was erroneously sentenced" to five years of imprisonment in excess of the otherwise applicable ten-year statutory maximum. *Id.* at 2a. But the court reasoned that petitioner had alleged only "sentencing error," which is "generally not cognizable in a collateral attack," and had not made a "substantial showing of the denial of a *constitutional* right." *Id.* at 2a-4a (emphasis added; citation omitted). The court also reasoned that petitioner could not show ineffective assistance because at the time of his sentencing *Hall* "foreclosed the argument that carrying a concealed

[2] Recently, the Eleventh Circuit squarely held that carrying a concealed weapon is not a "violent felony" under the ACCA. *United States* v. *Canty*, 570 F.3d 1251, 1255 (2009).

weapon was not a violent felony under the" ACCA. *Id.* at 4a. Concluding that "[petitioner] has failed to make 'a substantial showing of the denial of a constitutional right,'" the court denied petitioner's motion for a COA. *Id.* at 1a.

DISCUSSION

Petitioner contends that the court of appeals erred in denying him a COA under 28 U.S.C. 2253(c). The government agrees with that contention. In light of an intervening decision of this Court construing the ACCA, petitioner is under a sentence of imprisonment that exceeds the maximum term authorized for his offense, and he was deprived of the court's statutory discretion to impose a sentence lower than the correctly understood maximum. For the reasons set forth in the government's response to the petition for a writ of certiorari in *Watts* v. *United States*, petition for cert. pending (No. 08-7757) (filed Feb. 13, 2008), petitioner can therefore make a substantial showing of a due process violation. U.S. Br. at 8, *Watts*, *supra* (No. 08-7757). This Court should grant the petition, vacate the judgment below, and remand this case for further proceedings in light of the government's position.[3]

[3] In *Watts*, *supra*, the government suggested that this Court not only grant the petition and vacate the court of appeals' judgment but also remand with instructions for the court of appeals to issue a COA. U.S. Br. at 11, 14, *Watts*, *supra* (No. 08-7757). The government sought that disposition because, unless this Court directed the issuance of a COA, "the Eleventh Circuit on remand would otherwise be bound by" its decision in this case, which had held that "a sentencing error alone does not" satisfy Section 2253(c). *Id.* at 11 (quoting *Hunter* v. *United States*, 559 F.3d 1188, 1190 (11th Cir. 2009)). If this Court now grants the petition in this case and vacates the decision below, the Eleventh Circuit will be free to reconsider as a *de novo* matter whether to grant a COA, as petitioner and the government contend is appropriate. The

Amici Criminal Law and Habeas Corpus Scholars (Amici) contest that conclusion, arguing on a number of grounds that the court of appeals correctly denied a COA and that this Court should deny the petition for a writ of certiorari. Br. 2-27. Amici's contentions are not persuasive.

1. Amici first contend (Br. 5-6) that petitioner is not entitled to a COA because he does not present the type of claim encompassed by the language in 28 U.S.C. 2253(c) requiring a "substantial showing of the denial of a constitutional right." According to Amici, Section 2253(c) permits appellate review when reasonable jurists would debate whether an established constitutional rule applies to the particular facts, but not when reasonable jurists would debate the correctness of the asserted constitutional rule. See Br. 6 (contending that a COA "requires a constitutional claim whose application to the facts is debatable, not a claim that is only 'debatably constitutional'"). Amici thus argue that because, in their view, the constitutional rule petitioner asserts is not clearly established, the court of appeals correctly denied his application for a COA.

Amici's view is not supported by this Court's precedents, and it conflicts with the text and purpose of Section 2253(c). The principal basis for Amici's position is *Slack* v. *McDaniel*, 529 U.S. 473 (2000), in which this Court concluded that, to obtain a COA, an applicant must "demonstrate that reasonable jurists would find

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government therefore does not contend as it previously did in *Watts* that, in order to permit further review of petitioner's claims on remand, this Court must order the court of appeals to issue a COA. The government is filing a supplemental brief in *Watts* noting that, if this Court vacates the decision below, it would be appropriate to take the same action in that case.

the district court's assessment of the constitutional claims debatable or wrong." *Id.* at 484. But nothing in that formulation "presumes that the COA applicant presents" an incontestable "constitutional theory." Br. 6. To the contrary, a jurist's "assessment of the constitutional claims," as referenced in *Slack*, generally would encompass consideration of the viability of the applicant's legal theory. That conclusion is supported by the articulation of the "substantial showing" standard elsewhere in *Slack* and in *Barefoot* v. *Estelle*, 463 U.S. 880 (1983). Under that standard, an applicant "must demonstrate that the issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further." *Id.* at 893 n.4 (brackets in original; citation and emphasis omitted); see *Slack*, 529 U.S. at 484. That framework, which focuses courts on the questions and "issues presented," *ibid.*, is most naturally read to include not only claims as to which jurists can debate whether the particular facts satisfy an existing legal theory, but also claims as to which jurists can debate whether the legal theory is correct.

Consistent with this reading of Section 2253(c), courts of appeals have granted COAs to consider whether the asserted constitutional right exists. See, *e.g.*, *Paul* v. *United States*, 534 F.3d 832, 845 & n.6 (8th Cir. 2008) (noting that the court of appeals had granted a COA concerning "whether [the petitioner] has a constitutional right to competence during federal habeas corpus proceedings and, if so, whether that constitutional right was violated"). Courts have also framed the COA inquiry in language that encompasses review of "debatably constitutional" claims. See, *e.g.*, *United States* v.

Martin, 226 F.3d 1042, 1046 (9th Cir. 2000) (stating that, under *Slack*, "the court must decide whether the petition raises a debatable constitutional question") (emphasis omitted), cert. denied, 532 U.S. 1002 (2001). Amici point to no contrary authority prohibiting issuance of a COA on the ground that reasonable jurists could debate the correctness of the constitutional rule underlying the claim for relief.

Amici essentially seek to import into Section 2253(c) a limitation analogous to the rule of *Teague* v. *Lane*, 489 U.S. 288 (1989), barring appeal of any claim that is not based on a clearly established constitutional right. But the text of Section 2253(c) does not support such a limitation. As part of the same Act that contained Section 2253(c), Congress included language in a neighboring provision specifically prohibiting habeas relief on any claim adjudicated by a state court unless the challenged ruling, *inter alia*, violated "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. 2254(d)(1). Because Congress omitted similar "clearly established" language from Section 2253(c), such language is not properly read into that provision. *See Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets in original).

There is no reason to believe, moreover, that Congress wished to burden courts with conducting a *Teague*-type inquiry in all cases simply in order to decide whether a COA is warranted. By enacting a "threshold prerequisite to appealability" in Section 2253(c), Congress sought, among other things, to reduce the ju-

dicial resources that habeas litigation consumes in the courts of appeals. See *Miller-El* v. *Cockrell*, 537 U.S. 322, 337 (2003). Amici's interpretation of Section 2253(c) would not advance that goal, because it would add an additional layer of analytical complexity to the COA determination. Under Amici's view, before deciding whether the applicant has made a "substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2), courts would be required to undertake a threshold analysis of whether the applicant sought to apply an established constitutional rule to the particular facts of his case or instead sought to advance a new rule. This Court's cases make clear that such a distinction can often be subtle and difficult. See, *e.g.*, *Williams* v. *Taylor*, 529 U.S. 362, 381 (2000) (opinion of Stevens, J.) (noting "the 'inevitable difficulties' that come with 'attempting "to determine whether a particular decision has really announced a 'new' rule at all or whether it has simply applied a well-established constitutional principle to govern a case which is closely analogous to those which have been previously considered in the prior case law"'") (citation omitted); *Wright* v. *West*, 505 U.S. 277, 311 (1992) (Souter, J., concurring in the judgment) (noting that, because constitutional rules can be stated at varying "level[s] of generality," determining whether an asserted rule satisfies the "requisite specificity calls for analytical care").

Nor would Amici's reading of Section 2253(c) serve any valid purpose. The object of the *Teague* rule, and of the "clearly established Federal law" limitation in 28 U.S.C. 2254(d)(1), is to further the interests in comity, federalism, and finality by generally barring collateral attack on a state conviction based on rules that did not exist at the time the conviction became final. See, *e.g.*,

Wright, 505 U.S. at 308 (Kennedy, J., concurring in the judgment) ("The comity interest served by *Teague* is in not subjecting the States to a regime in which finality is undermined by our changing a rule once thought correct but now understood to be deficient on its own terms."). Requiring the court of appeals to conduct that analysis in every case at the COA stage is unnecessary to serve those values. While in some cases COAs may appropriately be denied because *Teague* would bar relief, that is not the only opportunity to apply *Teague*. If the COA is granted, and if the State asserts a *Teague* defense, the court of appeals can vindicate *Teague* interests in resolving the merits of the appeal. In any event, Amici do not contend that a COA is prohibited when the applicant asserts a rule that was announced after his conviction became final; instead, Amici would require that the asserted rule must "exist at the time the petitioner presents his habeas petition" to the district court. Br. 6. That interpretation of Section 2253(c) would serve only to insulate from appellate review a district court's habeas ruling that is exposed as incorrect by decisions issued while the petition is pending. The COA requirement was not intended to achieve that result.[4]

Amici have no basis for predicting that "perverse consequences" will follow unless Section 2253(c) is interpreted to exclude "debatably constitutional" claims. Br. 6-7. Courts are fully capable of denying appellate review when applicants attempt to "evade the COA gatekeeping function by inventing * * * specious

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[4] Amici's interpretation of Section 2253(c) would also result in a rule significantly more restrictive than *Teague* in some respects, because it would prohibit appellate review even when the claim rests on a purportedly "new" rule that fits within a *Teague* exception and even when the government does not raise a *Teague* defense.

claims" that purport to state a constitutional rule. *Id.* at 7. Amici's own arguments illustrate the point. In contending that litigants can "bootstrap" statutory or treaty violations into "debatably constitutional" claims, Amici emphasize the argument of petitioner in *Medellin* v. *Dretke*, 544 U.S. 660 (2005) (per curiam), that an alleged failure to comply with the Vienna Convention should be regarded as a Supremacy Clause violation. Br. 6-7. But this Court had little difficulty recognizing that Medellin's treaty arguments did not appear to be constitutional in nature. See *Medellin*, 544 U.S. at 664, 666 (noting "doubt" that Medellin's "allegation of a *treaty* violation" could satisfy the COA requirement of "a substantial showing of the denial of a *constitutional* right") (emphasis in original); *id.* at 664 (concluding that treaty violations appear to "rank[] among the 'nonconstitutional lapses we have held not cognizable in a postconviction proceeding'") (citation omitted). Other courts asked to grant COAs will also be able to distinguish such non-constitutional issues from genuinely debatable constitutional claims.

2. Amici next present a series of arguments (Br. 7-17) intended to demonstrate that petitioner's claim of "sentencing error" is not even "debatably constitutional," but is instead purely statutory, and therefore outside the scope of Section 2253(c). In particular, Amici rely on a number of cases that, they contend, establish that petitioner's sentence does not implicate the Due Process Clause. Amici also dispute the applicability of precedents that petitioner cites as supporting the due process right he seeks to vindicate. Amici's contentions are without merit.

a. Amici cite two decisions, *Lewis* v. *Jeffers*, 497 U.S. 764 (1990), and *Pulley* v. *Harris*, 465 U.S. 37 (1984),

for the proposition that due process protections extend only to sentencing claims that result from rulings that are "arbitrary," "capricious," or "egregious." Br. 8-9 (quoting *Jeffers*, 497 U.S. at 780; *Harris*, 465 U.S. at 41). But those decisions are irrelevant to this case. Neither resolved the general question of when sentencing error violates a defendant's due process rights, much less the specific question of whether due process prohibits imposition of a sentence in excess of the statutory maximum based on an error of law.

The issue in *Jeffers* was whether the Ninth Circuit had properly reviewed a state court's determination that the defendant's conduct satisfied a statutory aggravating circumstance. The defendant argued that the state court had not properly weighed the evidence in finding that the circumstance applied. This Court rejected that contention, explaining that it "reduces, in essence, to a claim that the state court simply misapplied its own aggravating circumstance to the facts of his case." *Jeffers*, 497 U.S. at 780. The Court therefore reversed the Ninth Circuit's decision, which had invalidated the state-court ruling based on "the sort of *de novo*" evidentiary review the defendant proposed. *Ibid.*

Jeffers thus concerned a sentence that the state court found to be authorized by state law and that resulted from the application of a concededly correct legal standard to the particular facts. That decision has no relevance to this case, which concerns a sentence that all agree *exceeds* the statutory maximum and that resulted from a pure and concededly *incorrect* conclusion of law by a federal court interpreting an Act of Congress. *Jeffers* did not state, moreover, that a sentencing error is unreviewable under the Due Process Clause, but rather held that a state court's application of an aggra-

vating circumstance violates that clause when it fails to satisfy a standard based on *Jackson* v. *Virginia*, 443 U.S. 307 (1979). And, contrary to Amici's contention, the Court in *Lewis* did not purport to announce that such a situation was "[t]he only circumstance in which * * * a sentencing error might present a constitutional claim." Br. 8.

Harris is similarly irrelevant. In that case, the defendant did not allege a due process violation and did not dispute that state law authorized the sentence he received. Rather, the claim in *Harris* was that a state court's failure to conduct "proportionality review"—comparing the defendant's sentence to those of other offenders—violated the Eighth Amendment's prohibition on cruel and unusual punishment. 465 U.S. at 39-40. The Court rejected the defendant's argument on the ground that the Eighth Amendment does not invariably require such proportionality analysis. *Id.* at 50-51. That the Court "denied the constitutional nature of the claim" (Br. 8) in *Harris* therefore has no relevance to the constitutional character of the claim in this case.

b. Amici also rely on two courts of appeals decisions addressing claims of error in the application of the federal Sentencing Guidelines. See Br. 9-11 (discussing *United States* v. *Cepero*, 224 F.3d 256, 263 (3rd Cir. 2000) (en banc), cert. denied, 531 U.S. 1114 (2001), and *Buggs* v. *United States*, 153 F.3d 439, 443 (7th Cir. 1998)). In both of those decisions, the habeas petitioner challenged his sentence based on disagreement with the district court's finding concerning the type or amount of drugs attributable to him for purposes of calculating the applicable Guidelines range. *Cepero*, 224 F.3d at 258; *Buggs*, 153 F.3d at 441. The court of appeals in each case denied a COA, concluding that allegations that the

district court miscalculated the Guidelines range do not assert a constitutional claim cognizable under 28 U.S.C. 2253(c)(2). *Cepero*, 224 F.3d at 267-268; *Buggs*, 153 F.3d at 442-443.

Amici contend that *Cepero* and *Buggs* are "indistinguishable" from this case (Br. 9) and therefore assert that a holding that petitioner's allegation of sentencing error states a constitutional claim would necessarily conflict with those decisions. *Id.* at 11. Amici are incorrect that *Cepero* and *Buggs* addressed the question presented here.

Amici's argument rests on the premise that, when *Cepero* and *Buggs* were decided, the top of the Sentencing Guidelines range had the same legal effect as the statutory maximum sentence. But that premise is false: under the regime that existed before this Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), district courts had discretion in appropriate circumstances to increase a sentence above the applicable Guidelines range, up to the true maximum set forth by statute. See, *e.g.*, Sentencing Guidelines § 5K2.0(a) and (a)(2)(B) (permitting "upward departures" from the Guidelines range when, *inter alia*, "there is present a circumstance that the Commission has not identified in the guidelines but that nevertheless is relevant to determining the appropriate sentence."). Thus, although Amici emphasize this Court's description of the pre-*Booker* Guidelines regime as "mandatory" and "binding" for purposes of the Sixth Amendment, Br. 10 (quoting *Booker*, 543 U.S. at 233), courts at the time of *Cepero* and *Buggs* did not conceive of the Guidelines as defining the limits of the court's sentencing power in the same manner as a statutory maximum. As this Court recently explained, even under a "mandatory" guidelines regime, "the top sen-

tence in a guidelines range is generally not really the 'maximum term . . . prescribed by law' for the 'offense' because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." *United States* v. *Rodriquez*, 128 S. Ct. 1783, 1792 (2008).

Contrary to Amici's argument, *Cepero* and *Buggs* therefore are readily distinguishable. The petitioners in those cases claimed misapplication of the Guidelines concerning a sentence that the district court had statutory authority to impose. The petitioner in this case, by contrast, challenges the constitutionality of a sentence that indisputably exceeds the limits authorized by statute. *Cepero* and *Buggs* do not resolve whether that fundamentally different claim presents a constitutional issue.

c. Amici seek further support for their contention that petitioner's sentencing claim is non-constitutional by analogy to cases involving other types of habeas challenges. Br. 11-14. In particular, Amici characterize this Court's decisions as refusing to recognize the "constitutional" status of habeas claims asserting that errors in statutory interpretation resulted in wrongful conviction. Based on that characterization, Amici argue that a claim cannot be deemed "constitutional" when it asserts that an error of statutory interpretation resulted only in an excessive sentence. That contention fails. This Court's decisions establish that, in certain circumstances, invalid convictions resulting from clear errors of law do violate due process, and those decisions in fact support petitioner's analogous sentencing claim.

The cases on which Amici rely, *Davis* v. *United States*, 417 U.S. 333 (1974), and *Gilmore* v. *Taylor*, 508 U.S. 333 (1993), do not stand for the proposition that

legal errors resulting in invalid convictions fail to state a constitutional claim. In *Davis*, this Court held that a prisoner could challenge on habeas his conviction for violating regulations that had since been invalidated. In reaching that conclusion, the Court did not "refuse[] to characterize" the erroneous conviction as constitutional error. Br. 11. The Court had no need to resolve that question of characterization because it concluded that, in any event, 28 U.S.C. 2255 permits federal prisoners to assert a challenge to confinement alleged to be "in violation of the Constitution *or laws* of the United States." *Davis*, 417 U.S. at 342-343 (quoting 28 U.S.C. 2255). *Davis* therefore is not properly read as a decision about the proper classification of the challenge; Amici cannot convert the Court's holding that the prisoner was entitled to pursue habeas relief into an implicit rejection of the constitutional status of his claims.

Taylor is even further afield. The sole question in that case was whether a Seventh Circuit decision invalidating a pattern jury instruction was retroactive under *Teague, supra*. The Court said nothing about whether a legal error resulting in an invalid conviction states a due process claim. Amici cite this Court's statement that "[i]nstructional errors of state law generally may not form the basis for federal habeas relief." Br. 12 (quoting *Taylor*, 508 U.S. at 344). But that observation arose in the course of rejecting the petitioner's contention that due process protects a defendant from "confusing [jury] instructions on state law which prevent a jury from considering an affirmative defense." *Taylor*, 508 U.S. at 544. *Taylor* reaffirmed the principle that due process prohibits a conviction based on jury instructions that permit conviction without proof of conduct satisfying the elements of the crime. See *id.* at 344 & n.2.

More fundamentally, Amici misapprehend the significance of statements in decisions such as *Taylor*, *Jeffers*, *Harris*, and *Estelle* v. *McGuire*, 502 U.S. 62, 67 (1991), that "federal habeas corpus relief does not lie for errors of state law," *Jeffers*, 497 U.S. at 780; see *Harris*, 465 U.S. at 41 ("A federal court may not issue the writ based on a perceived error of state law."). It is true of course that a state-law violation does not automatically establish a due process violation. But contrary to Amici's interpretation, that observation does not mean that *no* state-law violation can give rise to such a claim.

In fact, this Court has squarely held that due process prohibits a conviction for conduct incorrectly deemed criminal as a result of an erroneous statutory interpretation that is invalidated by a subsequent decision. Thus, in *Fiore* v. *White*, 531 U.S. 225 (2001) (per curiam), a habeas petitioner challenged his conviction under a statute that, as interpreted by the state supreme court in a decision issued after the petitioner's conviction became final, did not reach his conduct. The Court held that the petitioner's "conviction and continued incarceration on this charge violate due process." *Id.* at 228. "The simple, inevitable conclusion," this Court ruled, is that a State may not, "consistently with the Federal Due Process Clause, convict [the petitioner] for conduct that its criminal statute, as properly interpreted," does not prohibit. *Id.* at 228-229; see *Bunkley* v. *Florida*, 538 U.S. 835, 840-842 (2003) (per curiam) (applying the *Fiore* due process principle to invalidate a conviction for conduct that the state supreme court later interpreted the statute not to cover).

Fiore and *Bunkley* rest on the due process rules announced in *Jackson* v. *Virginia*, *supra*, and *In re Winship*, 397 U.S. 358 (1970), and this Court has "not

extended *Winship*'s protection to proof of prior convictions used to support recidivism enhancements." *Dretke* v. *Haley*, 541 U.S. 386, 395 (2004). But far from undermining petitioner's claim that due process prohibits imposition of a sentence in excess of the statutory maximum based on an error of law, this Court's decisions addressing the constitutional significance of convicting a defendant based on conduct that is not criminal under state law illustrate that some errors of state law that result in the imposition of criminal penalties not intended or authorized by the legislature do produce due process violations.

d. Amici also dispute the applicability of the precedents on which petitioner relies. They argue (Br. 14-17) that *Whalen* v. *United States*, 445 U.S. 684 (1980), and *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), do not support petitioner's asserted constitutional rule. But as the government explained in its response to the petition in *Watts*, *Whalen* supports a claim that due process prohibits imposition of a sentence in excess of the statutory maximum based on an error of law, and *Hicks* supports a claim that due process is offended when such an error deprives the defendant of the court's discretion to impose a sentence lower than the maximum. U.S. Br. at 8-9, *Watts*, *supra* (No. 08-7757). Those cases therefore furnish sufficient grounds to issue a COA on petitioner's challenge to his ACCA sentence.

Amici attempt to characterize *Whalen* as a case solely about the Double Jeopardy Clause, contending that the Court there held "only that the Double Jeopardy Clause prohibits consecutive sentences when Congress intended multiple convictions to be treated as a single criminal offense." Br. 15. Amici also dismiss as "dictum" this Court's statement in *Whalen* that, inde-

pendent of the Double Jeopardy Clause, the "Due Process Clause of the Fourteenth Amendment * * * would presumably prohibit state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law." *Whalen*, 445 U.S. at 690 n.4.

But *Whalen* cannot be so easily limited. That case held broadly that a federal defendant has a "constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress." 445 U.S. at 690. In the circumstances of *Whalen*, involving cumulative punishments for a single offense, the Court located that rule in the Double Jeopardy Clause. The Court emphasized, however, that this double jeopardy guarantee is "simply one aspect" of the more "basic principle" that courts may not sentence a defendant beyond what the law permits. *Id.* at 689. The Court recognized that, in the federal system, that rule is rooted in the "doctrine of separation of powers," and in a state prosecution, the same principle would follow from the Due Process Clause of the Fourteenth Amendment. *Id.* at 689 n.4. Thus, contrary to Amici's characterization, *Whalen* is not a Double Jeopardy Clause decision that "muses about" the Due Process Clause in dicta. Br. 15. *Whalen* instead states a basic constitutional principle—courts may not sentence a defendant in excess of statutory limits—that is embodied in both of those provisions. That principle directly supports petitioner's due process challenge to his sentence under the ACCA for conduct that does not fall within that statute.

Amici attack petitioner's reliance on *Hicks* by contending that, because "Hicks' sentence was *within* legally permissible bounds," that decision "had nothing to do with a sentence that exceeded a statutory maximum."

Br. 17. But petitioner does not cite *Hicks* primarily as support for the proposition that due process is violated by a sentence that exceeds the maximum permitted by law. Instead, petitioner contends that *Hicks* establishes "a related principle" that due process is violated when "the sentencer is erroneously prevented from exercising its statutory discretion to impose a lesser sentence" than the maximum. Pet. 16; see U.S. Br. at 9, *Watts*, *supra* (No. 08-7757) (relying on *Hicks* in observing that the petitioner could make a substantial showing of a due process violation because he "was deprived of the possibility that the district court would have exercised its discretion, as it could for a non-ACCA defendant, to impose a term of imprisonment shorter than ten years."). Amici offer no response to that separate basis for petitioner's due process claim other than to suggest that *Hicks* applies only to jury sentencing. Br. 17. But at least one court has stated that *Hicks* "is not * * * limited to imposition of sentences by *juries*." *Prater* v. *Maggio*, 686 F.2d 346, 350 n.8 (5th Cir. 1982). That court concluded that where, as "[i]n this case, the judge —not the jury—was vested with statutory discretion in sentencing," the *Hicks* principle was applicable. *Ibid.*

3. In addition to disputing the constitutional basis for petitioner's arguments, Amici contend (Br. 17-26) that the court of appeals properly denied a COA on the grounds that petitioner's claim is *Teague*-barred and that petitioner procedurally defaulted the due process challenge to his ACCA sentence by failing to assert it on direct appeal.[5] In the circumstances presented here,

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[5] Amici separately argue (Br. 25-26) that the petitioner in *Watts*, *supra*, also procedurally defaulted his claims by failing to assert a constitutional challenge to his ACCA sentence in his habeas petition. They assert that "[t]he Government mischaracterize[d] the record" in

those grounds do not justify denying petitioner the opportunity to seek relief from his sentence.

Courts may, of course, decline to issue a COA permitting review of a meritorious constitutional claim based on *Teague* or procedural barriers. The court of appeals, however, did not mention, much less rely on, procedural grounds in denying the COA in this case. Instead, the court of appeals rested its decision on the conclusion that petitioner had failed to make a "substantial showing of the denial of a constitutional right." Pet. App. 1a. For the reasons set forth above, the government believes that this ruling is incorrect. The government did not invoke *Teague* or procedural default as a

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Watts by "impl[ying]" otherwise. Br. 25. Quite apart from the inappropriateness of these arguments concerning the procedural history of a different case, Amici's contentions lack merit. As an initial matter, the government simply quoted the district court's description of Watts's claim and did not characterize it, let alone "mischaracteriz[e]" it, as Amici contend. U.S. Br. at 3, *Watts*, *supra* (No. 08-7757). In any event, Amici are incorrect that Watts failed to assert a due process challenge to his ACCA sentence in the district court. On two separate printed forms that the district court required Watts to use in initiating his habeas action, Watts asserted, as "Ground Three" for relief: "*Due Process Violation*[:] Trial court erred in finding that a conviction for carrying concealed weapon qualified as a violent felony under Armed Career Criminal Act." First Amended Motion to Vacate, Set Aside, Or Correct Sentence at 7, *Watts* v. *United States*, No. 8:07-cv-665-SCB (M.D. Fla. filed May 2, 2007) (emphasis added); see Second Amended Motion to Vacate, Set Aside, Or Correct Sentence at 7, *Watts* v. *United States*, No. 8:07-cv-665-SCB (M.D. Fla. filed May 21, 2007). Based on those filings, the district court correctly stated, in the portion of the decision the government quoted in its *Watts* response: "In ground three, Watts alleges that the trial court violated his Due Process rights. Watts contends that the trial court erred in finding that a conviction for carrying a concealed weapon qualified as a violent felony under the Armed Career Criminal Act." Pet. App. at A7, *Watts*, *supra*, (No. 08-7757). (We are serving a copy of this brief on the petitioner in *Watts*.)

basis for denying the COA in the court of appeals, nor does the government seek to interpose such arguments at this stage of the proceedings.

Petitioner has been sentenced to a term of imprisonment that all agree is in excess of what the law permits, based on a pure legal error that was exposed as incorrect by intervening decisions of this Court and the court of appeals. Petitioner has had no other opportunity to assert these claims. The government believes that in these circumstances the interests of justice warrant relief, and the government therefore does not oppose such relief by asserting discretionary procedural defenses. The government submits that the appropriate course is to grant the petition for a writ of certiorari, vacate the judgment, and remand to permit the court of appeals to reconsider whether, in light of the government's position, petitioner should be permitted a further opportunity to advance his claims.[6]

4. As the government has previously explained, see U.S. Br. at 8, *Watts*, *supra* (No. 08-7757), the court of

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[6] As an additional reason for this Court to deny review, Amici refer (Br. 26-27) to the possibility that petitioner could seek relief under 28 U.S.C. 2241 or 2255(e). But in the circumstances presented here, and given the already protracted litigation in this case, there is no reason to require petitioner to initiate a new action in the district court seeking the same relief under a different statutory provision. It is unclear, moreover, whether petitioner could invoke Section 2241 or 2255(e) under Eleventh Circuit law. See *Wofford* v. *Scott*, 177 F.3d 1236, 1244-1245 (1999) (declining to endorse the holding of another court of appeals that a prisoner could pursue relief through Section 2255 based on a claim "involving a 'fundamental defect' in sentencing," even "where the petitioner had not had an opportunity to obtain judicial correction of that defect earlier"). Nor would petitioner have an easier time in that proceeding overcoming the procedural-default rules that Amici contend preclude review in the court of appeals.

appeals on remand need not decide any more than that petitioner's constitutional claim is debatable. That conclusion would support the issuance of a COA under Section 2253(c), and the court of appeals should then remand the case to the district court. The district court, in the first instance, should have the opportunity to reconsider petitioner's constitutional claim in light of the change in law since its decision. See 28 U.S.C. 2106 (authorizing an appellate court to "remand the cause and * * * require such further proceedings to be had as may be just under the circumstances").

If the court of appeals were to remand to the district court for reconsideration of the due process claim, the district court would also be entitled to consider, as a threshold question antecedent to the constitutional issue, whether relief should be granted as a statutory matter because, in light of *Begay*, *Archer*, and *Canty*, see p. 5-6 & note 2, *supra*, petitioner's sentence exceeds the maximum term authorized. That is a cognizable ground for relief under Section 2255. See 28 U.S.C. 2255(a) (permitting relief, *inter alia*, when the movant's "sentence was in excess of the maximum authorized by law"); *cf. Davis*, 417 U.S. at 342-346 (holding that statutory as well as constitutional claims are cognizable under Section 2255, if the error of law constitutes a fundamental defect). "The prospect of a constitutional argument is needed to permit the COA to be granted; but once back in district court [petitioner] is free—on a first Section 2255 motion—to proffer non-constitutional claims." *Mateo* v. *United States*, 310 F.3d 39, 41 (1st Cir. 2002). Consideration of a statutory claim for relief, which the United States would not oppose on the facts of this case, would accord with bedrock principles of consti-

tutional avoidance. See *Ashwander* v. *TVA*, 297 U.S. 288, 348 (1936) (Brandeis, J., concurring).

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the court of appeals vacated, and the case remanded to the court of appeals for further consideration in light of the government's position.

Respectfully submitted.

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